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COMPROMISES OF THE CONSTITUTION

WHEN the question of adopting the Federal Constitution was being considered in the Pennsylvania state convention, James Wilson, who had taken an important part in the framing of that instrument, stated that the gentlemen of the opposition did not appear to appreciate, even in the most difficult part of the plan, the difficulties that had been experienced by the Federal Convention.[1] Inasmuch as the Constitution came forth as the practically unanimous product of the Federal Convention's labors, and the proceedings of that body were secret, it is not surprising that the men of that time should have failed to comprehend the difficulties that had been encountered. Since the publication of the records of the Convention, however, it is somewhat remarkable that those who have attempted to describe the framing of our Constitution should continue under similar if not the same misapprehensions of which Wilson complained in 1787. In nothing is this more clearly shown than in the treatment of the compromises that were such an essential feature of the Convention's work. Not only have some of the most important compromises been completely overlooked, but others have been greatly misrepresented, and in consequence the final outcome of the Convention's proceedings, as well as those proceedings themselves, have been sadly distorted.

The only explanation that appears plausible as to this misinterpretation of perfectly accessible facts is that the great source of our information as to what actually took place in the Federal Convention, the *Madison Papers,* first appeared in 1840.[2] This was just the time when the slavery question was becoming the all-absorbing topic in our national life, and it was but natural that the men of that time should turn to the debates of the Convention to see what the framers of our Constitution had said and done upon the question that was then uppermost in the minds of all. It is possible that as "Compromise" was the shibboleth of the '40's and '50's, men instinctively tended to support their position by the action of

[1] Elliot's *Debates*, first edition, 1827–1830, III. 297.

[2] The writer is at present engaged in an attempt to examine all the more important works dealing with the formation of the Constitution, in order to determine, if possible, the origin and development of current misconceptions. That examination is only partially completed, but it has been carried far enough to render extremely probable the explanation that is here given.

the "Fathers" in 1787. Under these conditions it is not surprising that the historical writers of that time, in treating of the formation of the Constitution, should overemphasize the slavery questions in the Convention. Take, for example, Richard Hildreth's *History of the United States*. The third volume, which covers the period of the Revolution and the Confederation, appeared in 1849. Of the chapter that is devoted to the "Formation of the Federal Constitution", one-third is taken up with the slavery debates; and of the "three great compromises" that he notices two are slavery compromises. The second volume of G. T. Curtis's *History of the Constitution* was published in 1858. Although Curtis does not neglect, as Hildreth did, the other features of the Convention's work, and although he corrects Hildreth's misapprehension that the counting of three-fifths of the slaves was the essential feature of the compromise in which both representation and direct taxation were to be apportioned according to population, he distinctly exaggerates the importance of the slavery questions and he chooses the same three provisions as the "grand compromises of the Constitution."

Knowing how closely one writer is apt to follow the thought if not the words of another writer, especially if the earlier work is regarded as authoritative, it may be readily understood why practically all subsequent writers have followed the lead of two such men as Hildreth and Curtis. George Bancroft, it is true, does not lay himself open to this charge, and in his *History of the Constitution* (1882) has produced the most detailed and unprejudiced study of our subject that has yet appeared. But even Bancroft failed to appreciate the significance of the Federal Convention's action in at least two cases to which particular attention is to be given in this article—the admission of new states and the method of electing the president. That his general interpretation of the Convention's work is not more universally accepted is doubtless due to the difficulty of appreciating his point of view. Owing to the tediousness of his method and to his inability or unwillingness to summarize his conclusions, Bancroft's work is really difficult to comprehend. Consequently there are many who cite him as an authority, but apparently few who really follow him.[1]

[1] An interesting illustration of this is to be found in the use of the term "Connecticut Compromise" for the agreement that was reached on the composition of the two houses of the legislature. Bancroft apparently adopted this designation because he believed, by a somewhat exaggerated interpretation of the part taken by them, that to the Connecticut delegates should be given the credit of getting this compromise adopted. Later writers have so generally accepted this appellation that its use has become almost universal, but the explanations as to why this compromise is so called are by no means harmonious. Perhaps Alexander Johnston's fanciful claim "that the birth of the Constitution was merely the grafting of the Connecticut system on the stock of the old Confed-

Is it not time to break away from the traditions that have been handed down to us from the days of the slavery struggle? One of those, the so-called "three-fifths compromise", ought certainly to be relegated to the myths of the past. That five slaves should count as three freemen had been incorporated in the revenue amendment of 1783 and had been accepted by eleven states before the Federal Convention ever met. When the Randolph resolutions were being considered in the Committee of the Whole, this same rule, avowedly taken from the proposed amendment to the Articles of Confederation, was adopted by a vote of nine to two.[1] It was also embodied in the New Jersey plan. To regard this as a compromise is altogether a misinterpretation. It was aptly described by Rufus King in the Massachusetts state convention when he said that "this rule . . . was adopted, because it was the language of all America."[2]

The other slavery compromise, upon the slave-trade and navigation acts, was a genuine compromise.[3] It is quite misleading, however, to put it among the foremost questions of the Convention. The executive, judiciary, western states, control of militia, and a dozen other subjects, all ranked above it in importance. It cannot be too strongly emphasized that in 1787 the slavery question was not the important question, we might say it was not the moral question that it was in 1850. The South demanded concessions, but the North was ready to make them, especially if it could obtain some concessions in return.[4] To magnify these questions to the exclusion or to the belittling of other interests is a complete misreading of history.

It has been customary to regard as compromises only such decisions as were reached in the Convention after sharp separation of parties along certain accepted lines of division, the appointment of a committee to devise some means of accommodation, and the adoption of their report or some other conciliatory measure requiring both

eration", and his altogether unwarranted statement that the terms of the compromise were "commonly cited as 'the Connecticut proposal'" (*Connecticut*, 322–325) have been of service. At any rate, the more generally accepted explanation of designating this compromise the Connecticut Compromise is to the effect that its principles were borrowed from that state, where was to be found popular representation in one branch of the legislature and local representation in the other — an explanation for which there appears to be no basis either in the records of the Convention or in the writings of Bancroft.

[1] Gilpin, *Papers of James Madison*, 842–843.

[2] Elliot, first edition, I. 56.

[3] It may not be amiss to reiterate here the position that is taken by the more careful writers upon this subject, that the prohibition of export taxes formed no part of this compromise. Cf. Gilpin, 1388, 1396–1397, 1415; Curtis, II. 296, note, 302–304; Bancroft, II. 152, 158.

[4] Compare Luther Martin's statement in "The Genuine Information laid before the Legislature of Maryland," in Yates, *Secret Proceedings*, 1821, 64.

sides to make more or less of a concession. It would not seem, however, to be an undue extension of the term, if under compromises we include cases in which the divisions were so sharp and the opinions so fixed as to force such a modification of certain provisions as would leave the clauses in question acceptable to both sides without antagonizing either, although no committees had to be appointed to accomplish these results. For example, in that part of the plan of government which provided for the organization of a federal judiciary, the provision that "Congress *may* . . . establish" inferior courts was phrased in this way to render it acceptable to those who favored the establishment of such courts, and to those who insisted that such tribunals would interfere with the rightful jurisdiction of the state courts.[1] Again, the provision that "all debts . . . shall be as valid against the United States as under the Confederation" was not modeled after the clause in the Articles of Confederation, as is so frequently stated; the wording is significantly different and was intended to reconcile the conflicting opinions of those who wanted the central government to assume the state debts, and of those who were opposed to such assumption.[2] But the most important of such modified clauses was that which provided for the admission of new states.

In colonial times, as population increased, in many instances so largely through the immigration of foreigners, and as settlement extended into the back country, the conservative moneyed interests of the coast, jealous of their power and fearful for their property, insisted upon retaining the control of government in their own hands and refused to grant to the interior counties the share in government to which their numbers of population entitled them. This was seen in its most obvious form in the inequality of representation in the legislature. Notably was this the case in Pennsylvania, Virginia, and the Carolinas.[3] And this inequality was maintained in the state governments that were formed after the outbreak of the Revolution. When the question of representation in the national legislature was before the Federal Convention, the same interests demanded similar restrictions. Pennsylvania's method of dealing with the frontier counties was cited with approval.[4] As it had worked well there for the older portions of the state to keep the power in their

[1] Gilpin, 798–800.

[2] *Ibid.*, 1356–1358, 1378–1379, 1402, 1424–1426. See statement by Bancroft, II 145.

[3] See "Memorial of the Paxton Men", in Parkman's *Conspiracy of Pontiac*, Appendix E; Lincoln, *Revolutionary Movement in Pennsylvania*; Jefferson, *Notes on Virginia*; Bassett, "Regulators of North Carolina", in *A. H. A. Report*, 1894; and Schaper, "Sectionalism and Representation in South Carolina", *ibid.*, 1900.

[4] Gilpin, 1072.

own hands, so now in the United States, it was insisted, new states ought not to be admitted on an equal footing with the old states.

Gouverneur Morris was the champion of the commercial and propertied interests, and when the compromise on representation was under discussion he declared in favor of considering property as well as the number of inhabitants in apportioning representatives. In explanation of his position he stated that he had in mind the "range of new States which would soon be formed in the West", and "he thought the rule of representation ought to be so fixed, as to secure to the Atlantic States a prevalence in the national councils."[1] A little later, on Morris's motion and evidently to phrase his views, a committee was appointed[2] and made a report,[3] which was frankly declared to be intended to give to the Atlantic states the power of "dealing out the right of representation in safe proportions to the Western States."[4] This portion of the report was at first adopted,[5] but was afterwards disregarded when the compromise was reached by which it was agreed to apportion both representation and taxation according to numbers of population.[6]

It is generally assumed that the question was thus finally disposed of. But Morris was not so easily defeated. The Committee of Detail to draft a constitution included in the article for the admission of new states a provision that such new states should "be admitted on the same terms with the original states."[7] Doubtless this provision was inserted because the committee so interpreted the action or sentiments of the Convention, or believed it warranted by them. When the article came up, in its turn, for consideration, Morris protested against this provision, and he made his objection on the same grounds as his previous opposition to representation in proportion to the numbers of population: "He did not wish to bind down the Legislature to admit Western States on the terms here stated. . . . [He] did not mean to discourage the growth of the Western country. . . . He did not wish, however, to throw the power into their hands."[8] Such men as Madison, Mason, and Sher-

[1] *Ibid.*, 1033–1034. [2] *Ibid.*, 1036, 1039. [3] *Ibid.*, 1051–1052.
[4] *Ibid.*, 1052–1053. [5] *Ibid.*, 1053.

[6] In the first stages of the discussion of the question of numbers of representatives, the conflicting interests of East and West were more important than those of slave and free states. Our later writers apparently fail to appreciate this fact, although it is clearly brought out by Hildreth, Curtis, and Bancroft.

[7] *Journal of the Convention*, 1819, 228. Professor William A. Dunning, *Essays on Civil War and Reconstruction*, 310, interprets this as referring only to the new states arising within the boundaries of any of the old states. From the wording alone, the meaning is doubtful, but the debate in the Convention upon this clause does not support Professor Dunning's interpretation. See Gilpin, 1456–1457.

[8] *Ibid.*, 1456–1457.

man opposed him,[1] but Morris succeeded in getting the objectionable clause stricken out, and then without a dissenting voice the Convention agreed to his substitute, "New States may be admitted by the Legislature into the Union",[2] or as it reads in the final draft, "New States may be admitted by the Congress into this Union."[3]

This phraseology is apparently so artless that it might well obtain the unanimous support of the Convention, but in view of its origin and authorship it acquires great significance. How great this is one hardly realizes until he reads Morris's own interpretation of the clause. Sixteen years later, at the time of the Louisiana purchase, in a letter to Henry W. Livingston,[4] he wrote:

> Your inquiry. . . . is substantially whether the Congress can admit, as a new State, territory, which did not belong to the United States when the Constitution was made. In my opinion they cannot.
>
> I always thought that, when we should acquire Canada and Louisiana it would be proper to govern them as provinces, and allow them no voice in our councils. In wording the third section of the fourth article, I went as far as circumstances would permit to establish the exclusion. Candor obliges me to add my belief, that, had it been more pointedly expressed, a strong opposition would have been made.[5]

Within the scope of this article it is not possible to discuss the whole "bundle of compromises" that make up the Constitution. If it were, it would be interesting to trace the fortunes of the clause that vests in the House of Representatives the right of originating money bills: how it was originally an exclusive right; how, in this form, it was sufficient to turn the scale in favor of the first great compromise[6]; how it served again in the same way in determining the compromise on the method of electing the president[7]; and how, when

[1] *Ibid.*, 1457.

[2] *Ibid.*, 1457–1458. The writer is indebted to Professor Frederick J. Turner, of the University of Wisconsin, for first calling his attention to the possible significance of the wording of this clause.

[3] Constitution, Article IV., Section 3.

[4] December 4, 1803, Sparks, *Life of Gouverneur Morris*, III. 192.

[5] Mr. Justice Campbell in delivering his concurring opinion in the Dred Scott case (19 Howard, 507) cited this letter of Morris's, and it was also introduced in support of the Government's cause when the Insular Cases were argued recently before the Federal Supreme Court. It is interesting to note, however, that in the latter instance only so much of the letter was quoted as asserts the right to govern as provinces, without voice in the federal councils, territory not originally belonging to the United States. That part of the letter which denies the right of admitting such territory into the Union was significantly omitted; *Brief in the Insular Cases*, Washington, 1901, 164.

Bancroft, *History of the Constitution*, sixth edition, II. 163, omits this particular letter but cites others by the same hand in support of his surprising statement that Morris "gave his ancient fears to the winds", and proposed the clause in question, "with the full understanding and intention that an ordinary act of legislation should be sufficient by a bare majority to introduce foreign territory as a state into the union."

[6] Gerry: "It was the corner stone of the accommodation"; Gilpin, 1098.

[7] *Ibid.*, 1501, note.

its sphere of usefulness as a compromise-factor was ended, it was ruthlessly shorn of its virtues by granting to the Senate an unrestricted privilege of amendment, and then was finally allowed a place in the Constitution. The control of the militia, the restrictions upon appointment to office of members of Congress, the powers of Congress, the restrictions upon the states, and the jurisdiction of the federal courts are some of the subjects that would repay a more careful study than has been generally accorded to them. Partly to show the possibilities of such a study, but mainly because its inherent importance has been so generally disregarded and because of the failure to recognize that the final determination was as genuine a compromise as any that was reached in the Convention—of far greater importance than the so-called slavery compromises, the method of electing the executive has been chosen to illustrate the current misinterpretations of the work and the difficulties of the Federal Convention.

When Wilson, as already cited, complained "how little the difficulties appear to have been noticed by the honorable gentlemen in opposition", he had particular reference to the method of electing the president, and he went on to explain that "the convention were perplexed with no part of this plan, so much as with the mode of choosing the President of the United States." A few weeks previous in the Federal Convention itself and toward the close of its sessions, when this question came up for its final determination, Wilson had expressed himself still more positively, saying: "This subject has greatly divided the House, and will also divide the people out of doors. It is in truth the most difficult of all on which we have had to decide."[1] Madison, in the Virginia state convention, also called attention to the fact "that the organization of the general government was in all its parts very difficult", and that "there was a peculiar difficulty in that of the Executive."[2]

So natural does it seem to us to have a single person as the chief executive of our federal republic, and so accustomed have we become to the attributes and powers of his office, that it is hard for us to project ourselves into the time before such an office existed and to sympathize with the apprehensions of those men as to the dangers that might lurk under the deceptive title of president. The necessity of a strong executive was clearly recognized, and the members of the Convention were determined that such should be established, but when their determination had been carried out, many stood aghast at the extensive powers that were vested in this officer. In spite of

[1] September 4, *ibid.*, 1491.

[2] Elliot, first edition, II. 389.

all the checks and limitations that were placed, there was color for the assertion that a monarchy, in fact if not in name, had been created. The opponents of the system recurred to this again and again, and its defenders found it difficult to refute the charge. When, in our own day, we find it hard to agree upon a satisfactory definition of monarchy that excludes the president of a republic more powerful than many monarchs, it is not to be wondered at that, at the time of the formation of the Constitution, the supporters of the new order were at a loss to defend their contention that no monarchy had been established.[1] *The president was not a monarch,* but beyond that they could hardly go. In other words, when forced out of generalizations and held down to specific definitions, their best efforts resulted in explaining the presidency in negative terms of monarchy. As an illustration of this, take the note made by President Stiles of Baldwin's account of what had taken place in the Federal Convention:

As to a President, it appeared to be the Opin. of Convention, that he sh[d] be a Character respectable by the Nations as well as by the foederal Empire. To this End that as much Power shd be given him as could be consistently with guard[s] against all possibility of his ascending in a Tract of years or Ages to Despotism and absolute Monarchy: — of which all were cautious. Nor did it appear that any members in Convention had the least Idea of insidiously lay[s] the Found[a] of a future Monarchy like the European or Asiatic Monarchies either antient or modern. But were unanimously guarded and firm against every Thing of this ultimate Tendency. Accordingly they meant to give considerable Weight as Supreme Executive, but fixt him dependent on the States at large, and at all times impeachable.[2]

If, then, we recognize the importance attached to the executive office in the minds of the members of the Convention—that, as Randolph said, the people would "behold . . . in the President the form at least of a little monarch"[3]—it is easy for us to understand that the method of choosing the incumbent of that office should have occasioned the greatest difficulty in a body of such diverse interests and such divergent views, and would naturally occupy a great deal of its attention. On twenty-one different days this subject was brought up in the Convention. Over thirty distinct votes were taken upon different phases of the method of election.[4] Five times they voted in favor of appointment by the national legislature, and once against it. Once they voted for a system of electors chosen by the

[1] Some said that the president was not a monarch because he was subject to impeachment, while others claimed that it was because he did not hold office for life or during good behavior.

[2] *Literary Diary of Ezra Stiles*, III. 294.

[3] Gilpin, 1313–1314.

[4] This does not include questions of term or eligibility.

state legislatures, and twice they voted against such a system. Three times they voted to reconsider the whole question. No wonder that Gerry should say, "We seem to be entirely at a loss."[1]

In the earlier stages of the discussion the question turned upon whether the executive was to be, as Roger Sherman expressed it, "nothing more than an institution for carrying the will of the legislature into effect",[2] or was to be independent of and really a check upon the legislative body. As the conception of the new government developed, however, and the executive grew into an all-important feature, the conviction was established that the president must be independent of the legislature, and to accomplish this the favorite method seemed to be some form of an indirect popular election.[3] But if the people were to choose, the large states would have a decided advantage, and hence there arose on this question also the old division between the large and the small states. The result was a compromise.

In order to understand the compromise that was made, it must be clearly appreciated that in adopting the electoral system the Convention acted on the assumption that in the great majority of cases —"nineteen times in twenty", Mason claimed[4]—the vote of the electors would not be decisive, that is, a majority of votes would not fall upon the same candidate. There were not wanting, it is true, members of the Convention who asserted that this would not be the case, but after Mason insisted that "Those who think there is no danger of there not being a majority for the same person in the first instance, ought to give up the point to those who think otherwise"[5], it was tacitly conceded.[6] With this understanding the terms of the compromise are perfectly clear. As the number of electors from each state was to equal the number of its senators and representatives, the large states, with their greater representation in Congress, would have a distinct advantage. To offset this, when no election resulted—as was assumed generally would be the case—from the highest five candidates a choice was to be made by that body which

[1] Gilpin, 1192. [2] *Ibid.*, 763.

[3] See statement by Gouverneur Morris in explanation of the report of the grand committee on September 4, *ibid.*, 1489–1490.

[4] *Ibid.*, 1490. In the Virginia state convention he was still more emphatic: "not once out of fifty"; Elliot, first edition, II. 363.

[5] Gilpin, 1499.

[6] Several times and by decisive votes the Convention refused to allow a smaller number than a majority of the electors to determine the choice. It is quite possible that here, as in so many other questions before the Convention, the large states or national party accomplished their purpose under a veil of concession. It was not for them to dispute the improbability of an election's resulting in the first instance. If they had the advantage in the choosing of electors, it was certainly still more to their benefit if, contrary to expectations, the electors were able to determine the result.

was equally representative of all the states, and in which it was conceded the small states would have an advantage, the Senate. In other words, and it was so explained again and again, under this system the large states would nominate the candidates, and the "eventual election" would be controlled by the small states.[1] Owing to the many objections that the giving of this, in addition to the extensive powers already vested in the Senate, would render that body too powerful, the eventual election was transferred from the Senate to the House of Representatives, but the principle was maintained by providing that each state should have but one vote.[2]

Although generally overlooked by those who have written on this subject, there can be no doubt that the final determination of the method of electing the president was a genuine compromise.[3] Gouverneur Morris,[4] King,[5] and Read[6] referred to it as such in the Federal Convention, and in the Virginia state convention Madison declared in so many words, "Here is a compromise", and he explained how the large states and the small states were affected by it.[7] Not only was it a compromise, it was the most successful of all the compromises. The importance of the subject and the conflicting opinions in the Convention rendered extremely probable the fulfilment of Wilson's fears that it would greatly "divide the people out of doors", but in 1788 Hamilton could write, "The mode of appointment of the Chief Magistrate of the United States is almost the only part of the system, of any consequence, which has escaped without severe censure."[8]

While the study that is here presented is a slight and evidently but a partial consideration of a really large and important subject, the results that have been attained are not without value. Briefly they might be summarized as follows: The first and greatest compromise of the Constitution was that which determined the composition of the two houses of Congress, the lower house to be representative of the people and the upper house of the states. In the second place, that five slaves should count as three freemen was not the important feature of the compromise by which both representation

[1] Compare statements by Madison, Sherman, King, and Gouverneur Morris in the Federal Convention (Gilpin, 1489, 1499, 1500, 1501, 1504, and 1506), and by Madison in the Virginia state convention (Elliot, first edition, II. 364).

[2] Gilpin, 1510–1511.

[3] Miss House, in her *Study of the Twelfth Amendment*, Philadelphia, 1901, 20, clearly recognizes the fact of a compromise, but she misses its essential elements.

[4] Gilpin, 1495.

[5] *Ibid.*, 1501–1502. See also Madison's note of explanation on page 1501.

[6] *Ibid.*, 1504.

[7] Elliot, first edition, II. 364.

[8] *The Federalist*, No. 68.

and direct taxation were to be apportioned among the states according to their respective numbers of population, which as a whole was only a subordinate part of the first compromise. Thirdly, one of the difficult, and perhaps the most difficult of all the questions that the Convention had to decide, the determination of which required a compromise second in importance only to the first compromise, was that of the method of electing the executive. In the next place, while its relative value must be a matter for individual judgment to determine, the compromise upon the slave-trade and navigation acts must be classed with a number of other matters of distinctly lesser importance. And finally, there are in the Constitution many clauses that one may not be inclined to regard as compromises of quite the same order as those that have just been considered, but they were worded sometimes ambiguously and always significantly, and when studied in this light they achieve an importance far beyond that which is usually accorded to them.[1]

MAX FARRAND.

[1] If the interpretation of the compromises that has been given is correct, it would seem to indicate that the whole treatment of the proceedings that resulted in the formation of our Federal Constitution must be revised. The Constitution, if such is the case, is a more direct result from the conditions during the period of the Confederation and a more unbroken development from the Articles of Confederation themselves than is generally supposed.